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Supreme Court of the United States

OCTOBER TERM, 1945

No. 953

IN THE MATTER

of

LONG ISLAND UNIVERSITY,
Debtor,

JOHN P. McGRATH and JOSEPH O'CONNOR, Trustees in Reorganization of Long Island University, and LONG ISLAND UNIVERSITY, Debtor,
Petitioners,

v.

FRANK FOX,
Creditor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN P. McGRATH,
Attorney for Petitioners.

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Frank Fox,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, John P. McGrath and Joseph O'Connor, Trustees in Reorganization of Long Island University, Debtor, and Long Island University, Debtor, respectfully submit this petition for a writ of certiorari for the purpose of reviewing the decision of the United States Circuit Court of Appeals for the Second Circuit in the above entitled proceeding.

By its decision (Record I), the Circuit Court of Appeals reversed an order of the District Court for the Eastern District of New York (Record 2a). The decision of the Circuit Court and the order entered on that decision on December 19, 1945 (Record X) reversed the order of the District

Court and remanded the matter in accordance with its opinion. The District Court had ruled that a judgment entered in favor of Frank Fox in the office of the Clerk of County of Kings on January 14, 1943, in the sum of $79,268.80 was a nullity, holding that it was jurisdictionally defective and, therefore, subject to collateral attack. It denied the petition brought by Fox in the reorganization proceedings to have that judgment declared a valid lien on the proceeds of sale of real property sold by the Trustees during the reorganization proceeding and for payment of such lien.

An action had been instituted in the Supreme Court of New York, Kings County by the Brooklyn National Bank in March, 1942, against the debtor University. The claim of the plaintiff bank was assigned to Fox during the pendency of the action and after the University had defaulted, and had stipulated that it had no defense to the action and that the plaintiff bank might have judgment for the relief demanded in its complaint. Fox never became a party to this action and never made a motion to be substituted as plaintiff or be joined with the plaintiff, the bank, as required by Section 83 of the Civil Practice Act of the State of New York. On the affidavit of an attorney for the bank, the attorney for Fox, who had never been substituted in the action, entered the judgment in favor of Fox and against the University. The assignment was filed as part of the judgment roll (Record 25a).

The District Court ruled that the clerk was a mere ministerial officer without power to enter a judgment in favor of a stranger and one not a party to the action, no motion having been made to join or substitute Fox under Section 83 of the New York Civil Practice Act. It held that the clerk had only the power to enter a judgment in favor of a named plaintiff on default of a defendant under Section 485 of the Civil Practice Act (Record 5a, 6a).

The Circuit Court of Appeals disagreed with the District Court and held that the judgment was not jurisdictionally defective. It ruled that failure to comply with the

provisions of Section 83 of the Civil Practice Act was merely an oversight on the part of the parties or court officials and amendable under Section 109 (12) of the Civil Practice Act, or at most an omission or irregularity which a New York court must ignore or correct under Section 105 of the Civil Practice Act (Record III, IV). On this theory the Circuit Court ruled that Fox had a valid judgment lien and remanded the proceedings to the District Court for further proceedings with respect to defenses other than those involving the invalidity of the Fox judgment. The District Court had predicated its opinion solely on the jurisdictional invalidity of the Fox judgment and did not pass on other defenses raised by the answers to the Fox petition, by the trustees, the debtor and another judgment creditor (Record 5a, VIII).

Jurisdiction

The order of reversal was entered in the Circuit Court of Appeals on December 19, 1945 (Clerk's certified order, Record IX). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347a).

The Issues of Law Involved

This case presents squarely the legal problem of whether or not a judgment is jurisdictionally defective and a nullity, when entered in favor of the assignee of a claim during the pendency of an action instituted by the assignor, without being substituted as the plaintiff or joined as a plaintiff with the assignor by order of the court, as required by Section 83 of the New York Civil Practice Act. Concededly the issue depends on the local New York law as defined in its statutes and interpreted by its courts.

Collateral to this principal issue are other important questions. One of these is whether or not the clerk is a mere ministerial officer without power under New York law

to enter a judgment in favor of one not a party to the action and not named therein as the plaintiff, in violation of the specific provisions of Section 485 of the New York Civil Practice Act. Another is whether or not a defendant is deprived of "due process" where no order is obtained of substitution or joinder of the assignee as a plaintiff, under Section 83 of the Civil Practice Act, and no application for such substitution or joinder is made on notice to the defendant, thereby depriving the defendant of any opportunity to question the validity of the assignment and the prosecution of the claim to judgment in the hands of the assignee.

Is not more than a mere irregularity, omission or mistake involved where a complete stranger to the action, over whom the court has never acquired jurisdiction, causes a judgment to be entered in his favor by ignoring the mandatory and specific statutory requirements for becoming a plaintiff? These are the principal points of law which have arisen in this case as the result of the divergent decisions of the District Court and the Circuit Court in interpreting the applicable local law of New York, as set forth in the statutes of New York and the decisions of its courts.

Statement of Facts

The facts in this case are undisputed. In the main they are set forth in the opinions of the District Court and the Circuit Court. The claim on which the judgment was entered in favor of Frank Fox was based on a note given by Long Island University, the debtor, to the Brooklyn National Bank in 1936. The bank started suit on the note in the Supreme Court, Kings County, in March, 1942. The defendant University appeared in the action, admitted it had no defense to the note and stipulated that judgment might be entered against it without further notice in favor of the plaintiff bank (Record II).

The bank assigned the claim to Frank Fox on December 26, 1942, for $15,000.00, Fox being guaranteed against loss

by Jerome Thralls, a director and chairman of the liquidating committee of the bank (Record 17a, 18a). Judgment was entered in favor of Frank Fox and against the University by the Clerk of Kings County on January 14, 1943, in the sum of $79,268.80. The judgment fails to designate Frank Fox as the plaintiff (Record 25a). No further steps were taken to enforce the judgment after its docketing and in September, 1943, the University filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act (Record III).

It is conceded that if the Fox judgment is valid it was a lien on the real property of the debtor University when it went into reorganization and is a lien on the proceeds of sale of such real property. This real property was sold during the reorganization by the trustees upon refinancing of the first mortgage. Thereafter one Edmund F. Mulholland, to whom Fox had assigned the judgment, petitioned the District Court to declare the judgment a valid first lien against the proceeds of sale of the realty and for payment of the alleged lien. Answers were interposed by the trustees, the debtor and by another judgment creditor, but only the defenses involving the invalidity of the Fox judgment were passed upon by the District Court and the Circuit Court. These defenses were all substantially the same and set forth that the judgment was a nullity, jurisdictionally void and of no legal effect (Record 15a, 16a). During the trial of the claim the District Court granted a motion substituting Fox as the claimant and creditor in place of Mulholland, the judgment having been re-assigned by Mulholland to Fox (Record 3a). After the trial the District Court rendered its opinion finding that the judgment was a nullity (Record 13a). On that decision an order was entered denying the Fox motion on April 16, 1945 (Record 3a). On appeal to the Circuit Court of Appeals for the Second Circuit that court ruled that the judgment was not jurisdictionally defective and was a first lien on the proceeds of the realty (Record I). An order was entered in the Circuit Court on December 19, 1945, reversing the order of the

District Court and remanding the matter for further proceedings in accordance with its opinion (Record IX). The facts as to the action in the Supreme Court, Kings County, started by the Brooklyn National Bank, and the entry of the judgment, are a matter of record and were established by the introduction of the judgment roll and records of the Supreme Court. They are as follows:

1. No action was ever instituted against the debtor by Frank Fox.

2. The only action ever started with reference to the claim on which the Fox judgment is alleged to be based was an action instituted by the Brooklyn National Bank in the Supreme Court, Kings County, on or about March 10, 1942.

3. That the claim on which suit was instituted by the bank was assigned to Fox on December 26, 1942.

4. That Fox was not a party to the action instituted by the bank and was never made a party to that action. No order was ever obtained or even requested to substitute Fox as the plaintiff or to join him as a party plaintiff under Section 83 of the New York Civil Practice Act. No amended or supplemental pleading was ever served and no order for the service of such pleading was ever granted or even requested under Section 87 of the New York Civil Practice Act.

5. No judgment in the action started by the bank was ever entered by the bank, the plaintiff in that suit.

6. The summons and the complaint (Record 19a) in the bank's action were captioned "Brooklyn National Bank of New York, plaintiff, against Long Island University, defendant."

7. The attorneys of record for the plaintiff bank were Scudder, McCoun, Stockton & Kerfoot, Esqs. (Record

19a). There was never any substitution of attorneys for the plaintiff.

8. The judgment recites its entry "on motion of Lynn G. Goodhouse, attorney for the plaintiff," although Mr. "Goodhouse" never appeared in the action and had never been substituted as attorney for the plaintiff bank (Record 25a).

9. The judgment is in favor of "Frank Fox" and against "Long Island University, defendant." The judgment fails to designate Frank Fox as the plaintiff. It merely adjudges that Frank Fox, without describing him as the plaintiff, recover of Long Island University, the defendant, the sum of $79,248.75, with interest. It is unprecedented to omit from a judgment, after the name of the plaintiff, the word ", the **plaintiff,**". Long Island University was properly described as the defendant and there was apparently an intentional omission of the words ", the plaintiff," after the name of Frank Fox.

10. The judgment roll bore the caption of "Frank Fox, plaintiff, against Long Island University, defendant," and the name of Lynn G. Goodnough appeared thereon as attorney for plaintiff. The judgment was entered by Lynn G. Goodnough.

11. The only reference to the assignment of the claim by the bank to Fox, which assignment is dated December 26, 1942, is contained in the affidavit of regularity, verified on December 29, 1942. That affidavit recites the fact of the assignment and the assignment was filed as part of the judgment roll (Record 24a). Mr. Goodnough, as the attorney for Fox, prepared the judgment roll and entered the judgment.

12. The complaint of the plaintiff bank contains no reference to the assignment (Record 19a). The complaint was never amended and the claim was assigned after the suit was instituted.

The Reasons Relied on for the Allowance of the Writ

The Court below has decided an important question of local New York law in a way probably in conflict with applicable local decisions. The Circuit Court has decided that a judgment may be entered by a court clerk, a mere ministerial officer, in favor of one not a party to the action, to whom the claim in suit was assigned after the start of the action, without such stranger to the action becoming a party as required by the applicable New York statutes. Such a decision is in conflict with the local law of New York, as set forth in statutes specifically applicable thereto and in the decisions of the courts of New York.

The decision of the Court below denies to the defendant the opportunity to defend against the assignment, and thereby denies to such defendant the due process required by New York statutes and decisions. The ruling conflicts with New York statutes limiting the entry of judgment by the clerk to a judgment in favor of a named plaintiff. The opinion of the Court below further conflicts with the mandatory New York statutory requirements for proceeding with an action after the claim in suit has been assigned. Applicable New York decisions require a ruling that the Fox judgment is jurisdictionally defective and a nullity.

WHEREFORE, your petitioners respectfully pray that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

Dated, Brooklyn, New York, March 13, 1946.

JOHN P. MCGRATH,
JOSEPH O'CONNOR,
Trustees in Reorganization of Long Island University, Debtor.

LONG ISLAND UNIVERSITY, *Debtor*,
by TRISTRAM WALKER METCALFE,
Dean,
Petitioners

BRIEF IN SUPPORT OF PETITION

POINT I

The Court below has decided an important question of local New York law in a way in conflict with applicable local decisions.

A. The decision sought to be reviewed is in conflict with the local law of New York, as set forth in specifically applicable statutes.

The assignability of a chose in action is covered by Section 41 of the Personal Property Law of the State of New York. Under subdivision 3 thereof a transfer of a claim passes any interest which the transferee may enforce by an action in his name as the transferor might have done "subject to any defense or counter-claim * * * against the transferee."

Under Section 210 of the New York Civil Practice Act the assignee is the only one who may sue on the claim (*Foster* v. *Central National Bank,* 183 N. Y., 379, 384). The question of what happens where a claim is assigned after an action has been commenced is covered by Section 83 of the Civil Practice Act, which provides:

> "*Proceedings upon transfer of interest, or devolution of liability.* In case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party, unless the court directs the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party as the case requires."

In this case the action started by the Brooklyn National Bank could have been prosecuted to judgment by it, or Fox

could have been substituted by order of the court in place of the bank, or Fox could have been joined by court order as a party plaintiff. None of these three methods of procedure was followed. The section was completely ignored, although its provisions are mandatory and specifically applicable to the situation involved in this case. There was no mistake by Fox. He deliberately entered a judgment in his own name.

Under Section 87 of the Civil Practice Act, if the assignee applies in his own behalf, the court "may" direct that he be made a party by amendment of the pleadings or otherwise, as the case requires. If the plaintiff makes the application to bring in an assignee as a defendant, the court can direct that a supplemental summons and pleading be issued. This provision of the New York statutes was likewise ignored by Fox and there was never any opportunity for the University to enter any defense or counter-claim against the assignee or question the assignment.

The New York statutes also have specific provision for the entry of a judgment on default by the Clerk in a case such as this. Under Section 485 of the Civil Practice Act the Clerk could have entered judgment for the bank. Sections 485-487 of the Civil Practice Act make it obvious that judgment may be entered only in favor of a named plaintiff, in favor of a party to the action. The power of the Clerk is specifically limited to the procedure set forth in these sections.

The Circuit Court rested its decision on the provisions of Section 109 (12) and Section 105 of the Civil Practice Act, which provide for correction of errors or mistakes. These sections do not cover jurisdictional defects, and it is respectfully submitted that the District Court was correct when it held in its opinion that Section 109 is not applicable. The District Court pointed out in its decision:

> "That section relates to the act of entering a judgment with authority and mere irregularity does

not void a judgment entered pursuant to this section. A careful reading of the language of this section indicates clearly that it does not cover a situation or a state of facts where there has been a transfer of interest or devolution of liability. A review of the decisions of the said court indicates that clearly. Where there is such a transfer of interest, as in the instant case, the procedure laid down under *Section 83* must be followed." (Record 5a)

Where a judgment is entered in favor of a party over whom the court never had jurisdiction, who is an absolute stranger to the action and has never been made a party by court order as required by specific statutes, there is a basic jurisdictional defect. A specific procedural pattern, involving substantial rights, is statutorily established in New York and the decision of the Circuit Court discards it. The court below validated a judgment where there was an absolute lack of power to enter it.

B. The decision sought to be reviewed is in conflict with the local New York law by denying a defendant the right to contest an assignment.

The highest court of New York has held that when an assignee seeks to be substituted in an action he must give notice to the defendant. (*Smith* v. *Zalinski*, 94 N. Y. 519; 522). Defendant has the right to contest the title of the transferee. Id. 521-2. If defendant dispute the assignment, he is given a chance to contest the new ownership. The Court may decide it on the motion or direct the issue to be carried over to the trial. In the latter situation defendant would be entitled to a trial by jury. Id. 523. When the motion to substitute is granted, it is a binding adjudication. Id. 521. Furthermore, under Section 41, subdivision 3, of the Personal Property Law, defendant has the right to assert a defense or counter-claim against the transferee.

All these rights and privileges, the Clerk at the instance of Fox, has swept away with an assertion of power beyond that held by the Court itself, for he has even passed upon the validity of the assignment without notice to the debtor. It makes no difference whether or not the debtor had any defense to the assignment or had any counter-claim, the fact remains that the County Clerk has not only attempted to usurp the functions of the Court but has exceeded them. This radical, unauthorized action cannot be characterized as an irregularity, when it cuts off the substantial right to defend and counter-claim.

It is respectfully submitted that the decision of the Circuit Court denied due process by denying a day in court to contest the assignment and defend against the assignee. More than protection against a possible double claim is involved in the ruling in *Smith* v. *Zalinski*. The cause of action on which judgment was entered was a simple claim in favor of the bank. The only claim Fox had was by virtue of his assignment and the defendant never had an opportunity to contest that claim, because no pleading was ever filed that recited the assignment and no motion was ever made that would have raised the question of the assignment and permitted the defendant to have its day in court with respect to the assignment. Both the parties and the cause of action were changed by the act of Fox. The Court had no jurisdiction of either Fox or the changed subject matter of the action.

C. The decision sought to be reviewed is in conflict with the decisions of the courts of New York holding that in a case, such as this, involving a matter of substance and power, a jurisdictional defect exists and the judgment is a nullity.

It is respectfully submitted that on the facts of this case the Clerk had no power to enter the judgment and a jurisdictional defect exists. The Clerk is a purely ministerial officer and has only the power conferred upon him by statute. Before he can enter a judgment everything

essential to his jurisdiction must appear or else his act is void.

3 Freeman on Judgments, 5th ed. Secs. 1280, 1283;
1 id. Sec. 47, p. 78;
1 Black on Judgments, 2nd ed. Sec. 88;
Bouker Contracting Co. v. *Neale,* 161 App. Div. 617 (2nd Dept.);
Shorer v. *T. P. & P. Co.,* 119 N. Y. 483;
Stock v. *Mann,* 255 N. Y. 100.

In the *Bouker Contracting Co.* case, cited above, where the Clerk had power only to enter judgment in a contract action, and the complaint joined causes of action in tort and contract, it was held that the judgment was a nullity and absolutely void.

In the *Shorer* case, cited above, where an order required by the statute to interpose an answer was lacking, the Clerk was held to have exceeded his powers and the judgment was deemed a nullity.

In the case of *Cartier* v. *Spooner,* 118 App. Div. 342, where there was a reference to hear and report, and the Court never confirmed the report, it was held that the Clerk had no authority to enter a judgment and that a judgment under such facts was a nullity.

In *Greenfield* v. *Greenfield,* 215 App. Div. 504, a judgment was vacated for lack of power of the Clerk where it was entered on a stipulation of the parties in a separation action.

In *Christal* v. *55 Columbus Corp.,* 168 Misc. 118, where the defendant defaulted and an affidavit required by the statutes was lacking, the judgment was vacated even though there was no legal excuse for the default.

In *Fidelity & Casualty Co.* v. *Marendino,* 202 App. Div. 24, where a judgment was entered on a confession, it was held that it must be vacated as having been entered without authority, the court saying at page 26 of its opinion:

> "If there was no authority for the entry of judgment upon the confession, the judgment should not have

> been entered and is void. There is a vast distinction between an irregularity and a void judgment; an irregularity may be cured, but a void judgment cannot stand."

It is respectfully submitted that the doctrine of the leading New York case of *Herpe* v. *Herpe*, 225 N. Y. 323 is in conflict with the decision of the Circuit Court in this case. The New York Court of Appeals in its decision in the *Herpe* case held that where substantial rights of a party are involved, a judgment is not susceptible of correction by amendment. The court said at page 327 of its opinion:

> "Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected by the trial court through an amendment."

The doctrine of the *Herpe* case has been consistently followed by the courts in New York State since it was first enunciated. Under that decision, amendment is not permissible unless there is a clerical error or a mistake in the entry of judgment or the omission of a right or relief to which a party is entitled as a matter of course. As in the *Herpe* case, the flaw in the Fox judgment does not come within the class of defects and mistakes that are curable by amendment as a matter of course. The substantial rights of the parties were involved in the entry of judgment in favor of one who was not a party to the action based upon title to a claim that was in no way involved in the complaint in the action and was never raised by motion. The granting of a judgment to one not a party to the action is certainly as much a "substantive part of a judgment" as the matter of awarding costs in an equity action, the problem in the *Herpe* case.

It is respectfully submitted that a substantial right was affected and a fundamental lack of power existed on the facts of this case. The decision of the Circuit Court in

ruling that only a mere irregularity or mistake was involved, conflicts with the applicable local decisions of the New York courts cited above.

CONCLUSION

The petition for a writ of certiorari should be granted since the Court below has decided an important question of New York law in a way in conflict with applicable local decisions.

Respectfully submitted,

JOHN P. MCGRATH,
Attorney for Petitioners.

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Petitioners,

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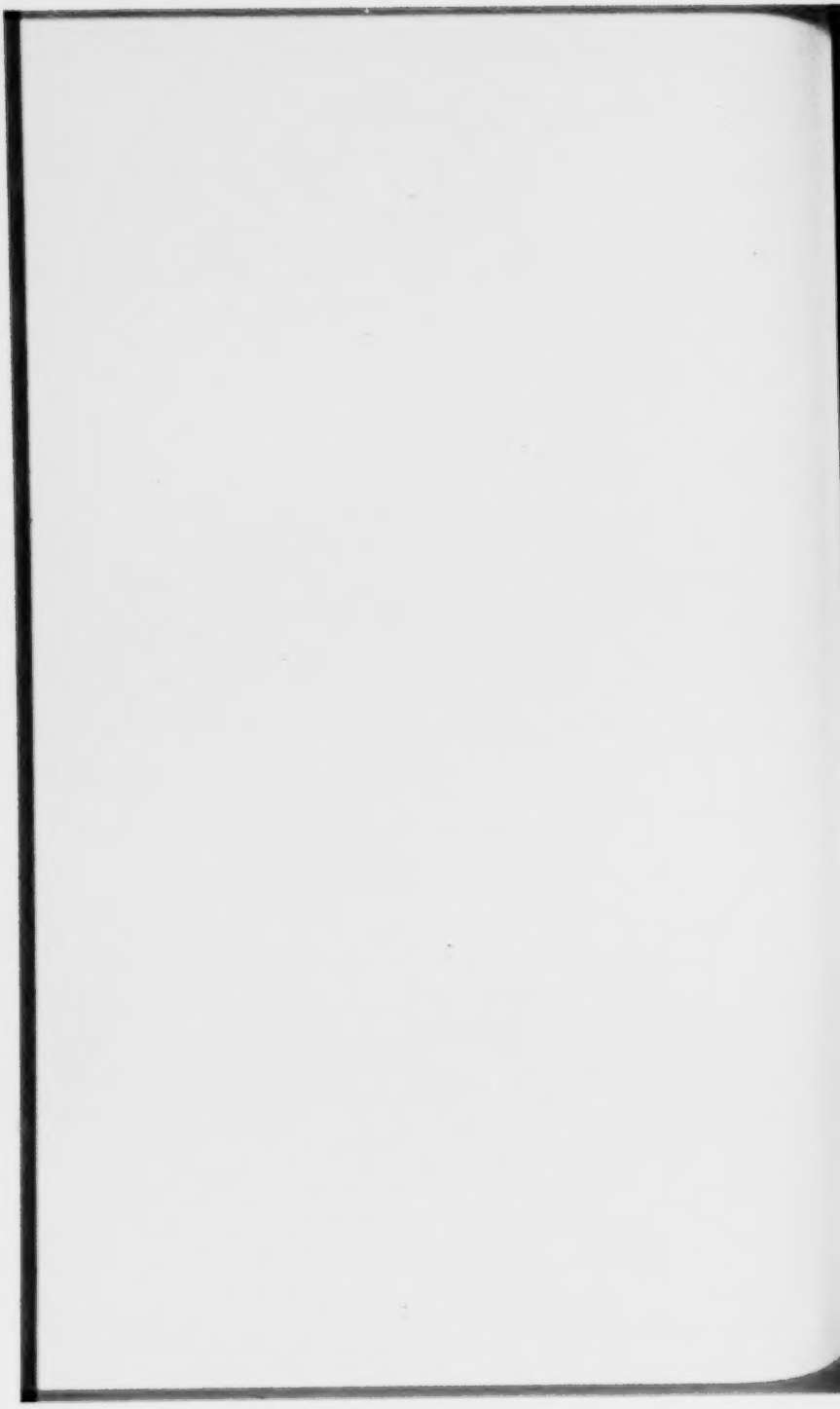
Creditor-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CADWALADER, WICKERSHAM & TAFT,
WALTER BRUCHHAUSEN,
Attorneys for Respondent.



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Petitioners,

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FRANK FOX,

Creditor-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 2 Cir., 152 Fed. (2d) 616. The opinion of the District Court is not reported excepting in the record at page 3a.

The Petitioners Have No Valid Ground for Their Application for a Writ of Certiorari.

The case merely involves a question of procedure under New York Law. The respondent contends that there is abundant final authority on the point. The petitioners themselves do not claim that the ruling of the Court below is definitely in conflict with local decisions. They qualify their assertion with the statement that it is "probably in conflict" with such decisions (p. 8 of Petitioners Application).

Statement of the Case.

The respondent respectfully prays that this Court deny the petition for a writ of certiorari to review the order of the United States Circuit Court of Appeals for the Second Circuit, which unanimously reversed an order of the United States District Court for the Eastern District of New York. The said order of which a review is now sought determined that a judgment recovered by the respondent Fox against the debtor on January 14, 1943 was a valid first lien against the proceeds of the sale of the Debtor's real property. The Chapter X petition herein was filed on September 3, 1943.

The petitioners' contention is that the judgment is jurisdictionally defective and that the lien thereunder is void because of the failure to obtain an order substituting Frank Fox as the party plaintiff in the action, hereinafter mentioned, in the place of The Brooklyn National Bank.

On the other hand, the respondent contended that the judgment and lien are valid and may not be attacked collaterally in this proceeding; also that the failure to procure such an order was merely an irregularity.

Many of the matters recited on pages 6 and 7 of the petitioners' application are not facts. They are erroneous conclusions of the petitioners. We are therefore obliged to state the facts in brief.

In 1936 the debtor, Long Island University, became indebted to Brooklyn National Bank. In April, 1942 the said Bank brought suit on said claim in the Supreme Court, Kings County. The debtor was personally served with the summons and complaint and appeared by attorney. In July, 1942 the debtor and its attorneys signed a stipulation admitting that it had no defense to the action and that plaintiff was entitled to judgment, without further notice (R. 23a). In December, 1942 the said Bank assigned the cause of action to the respondent, Frank Fox. The assignment was in writing. The petitioners do not deny that the moneys were owed. No question is raised as to the validity of the assignment. In fact, the petitioners-trustees allege in their answer that the assignment was made (R. 15a).

The assignee's attorney prepared a judgment roll, including the assignment, the affidavit of regularity, made by the Bank's attorney, the judgment, prepared by and in the name of Lynn G. Goodnough, as attorney for Frank Fox, as plaintiff, and other necessary papers. The affidavit of regularity, in part provided:

> "that the Brooklyn National Bank of New York has assigned and transferred to Frank Fox, the plaintiff, all its right, title and interest in the within claim and cause of action and in and to all moneys now due and to become due to said The Brooklyn National Bank of New York on account of and by reason of the said claim and cause of action, which assignment is filed as part of this judgment roll" (R. 24a).

Contrary to petitioners' assertion, the answer of the trustees alleged "that the judgment was entered * * * in

an action captioned 'Frank Fox, Plaintiff *v.* Long Island University, Defendant' * * *".

Within a month after entry of the judgment the debtor was informed that Fox had recovered judgment (R. 16a). Two months later, in April, 1943, the debtor notified all of its creditors that Fox was the assignee and had entered judgment in his favor. (Trustee's Exhibit 13, T. R. 100.) Contrary to petitioners' statement, the respondent instituted supplementary proceedings and moved for a receiver. (Admitted allegations of the pleadings herein.)

In its petition for reorganization herein, dated September 2, 1943, the debtor alleged that it owed the said claim, that it was assigned to Fox and that judgment was obtained by him (R. 28a).

The petitioners fail to inform the Court that the guaranty by Mr. Thralls to Mr. Fox was given subsequent to the assignment made to him (R. 18a).

The Issue on this Application.

That the failure of the respondent Fox to obtain an order of substitution was a mere irregularity and the validity of his judgment was not affected by such omission.

POINT I.

Failure of the respondent to obtain an order, substituting himself as a party plaintiff in the action, was a mere irregularity and did not prejudice a substantial right of the debtor and must therefore be disregarded.

The respondent admittedly did not obtain an order substituting himself as party plaintiff as was his right under Sections 83 and 485 of the New York Civil Practice Act.

The petitioners' entire case rests upon that omission. The petitioners do not establish that such omission prejudiced any substantial right. As we have demonstrated, there is no basis for such a claim. They admitted the indebtedness to the Bank. They conceded that the Bank duly assigned its claim to the respondent Fox.

The distinction between a jurisdictional defect and an irregularity is simply this: if the debtor's substantial rights were thereby prejudiced, the defect would be jurisdictional, otherwise not. The New York Statute expressly states that irregularities of procedure must be disregarded.

The statute was before this Court on *Irving Trust Co.* v. *American Silk Mills,* 2 Cir., 72 Fed. 2d 288, certiorari denied 293 U. S. 624. It appeared therein that Irving Trust Company, as receiver of Garment Center Capitol Inc. sued for rent under a lease made by that corporation, as landlord, to the defendant and recovered a money judgment. On appeal to the Circuit Court of Appeals, the defendant contended that the judgment was invalid in that the receivers were not the proper parties plaintiff. The said court on appeal amended the judgment *nunc pro tunc* by substituting Garment Center Capitol Inc., a stranger to the action, as party plaintiff. In holding that the omission to obtain the order of substitution, prior to judgment, was merely an irregularity, the court quoted the curative statute, Section 105 of the New York Civil Practice Act, to wit:

> "At any stage of any action, special proceeding or appeal, a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the Court, with or without terms, or, if a substantial right of any party shall not be thereby prejudiced, such mistake, omission, irregularity or defect must be disregarded."

Section 109 subdiv. 12 of the said Practice Act, a companion to the said Section 105, reads, in part:

> "In a court of record * * * the judgment shall not * * * be impaired or affected * * * for any other default or negligence of the clerk or any other officer of the Court or of a party, his attorney or counsel, by which the adverse party has not been prejudiced. Each of the omissions * * * and any other of like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must be supplied when necessary, and the proceeding amended, by the Court wherein the judgment is rendered or by an Appellate Court."

The Court below, in its opinion, said:

> "And failure to comply literally with its terms (the terms of Section 83 of the said Practice Act, as to obtaining an order of substitution) appears to be an oversight on the part of the parties or court officials of the kind which is amendable under N. Y. Civil Practice Act 109(12), or at most an omission or irregularity which a New York court must ignore or correct under 105. In fact 2 R. S. 1829, pt. 3, tit. 5, p. 425, Sec. 7, which was the predecessor of 109, was so construed in Christal *v.* Kelly, 88 N. Y. 285, 286, where the plaintiff had failed to comply with the statute requiring a court order for amendment to add a party. And in Wight *v.* Alden, 3 How. Pr., N. Y. 213, before even the passage of the remedial Sections, the court denied a motion to set aside a judgment upon confession on the grounds that the plaintiff failed to obtain the required court order. Here, as in both of the cases cited, there is apparent no injury to respondents through the omission to procure a court order. The debtor itself stipulated that it had no defense to the action brought by the Brooklyn National Bank, and it has not seriously questioned the validity of the assignment to Fox."

In *Miskind-Feinberg Realty Company* v. *Sidorsky,* 189 N. Y. 402, cited by the court below, the court (p. 407) said:

> "The Supreme Court has very broad powers, * * * after judgment * * * to amend any process, pleading or proceeding. (Sec. 723, now Section 105 of the Practice Act.) It would be difficult to use more comprehensive language than is used in that section. * * * The statutory provisions relating to the commencement of an action are intended for the protection of the rights of the persons who are named as defendants therein. Whatever the statute requires that in any way tends to aid a defendant in the protection of his rights is necessary to be complied with to give the court jurisdiction. Where it is clear that a deviation from the Statute is unimportant and unsubstantial and the defendant has not been prejudiced thereby it is within the power of the court to amend the process or proceeding. The order * * * was not void but irregular * * *"

The court below further said:

> "A striking case of this kind is People *ex rel.* Durham Realty Co. *v.* Cantor, 234 N. Y. 507, 138 N. E. 425, reversing 201 App. Div. 834, 192 N. Y. S. 657, reversing on the dissenting opinion of Clark, J., below and allowing late substitution of an individual for a corporate name in certiorari proceedings for reduction of tax assessments."

In *Christal* v. *Kelly,* 88 N. Y. 285, 290, it was held that the debtor's obligation was the cause of action. A change in the name of the party would not, therefore, constitute a new cause of action.

The court below said:

> "They (the petitioners) rely upon Smith *v.* Zalinski, 94 N. Y. 519, 522, where, however, the court

> significantly added: 'Such a transfer of interest is usually a formal matter in which the defendant has no concern except to be protected from a double claim.' Here the court had general jurisdiction, and the defendant has appeared. The New York courts have consistently said that, even where notice of motion is required for further proceedings in an action, failure to give it is not a jurisdictional defect. * * * The several cases cited by respondents seem to us clearly instances where there is a fundamental lack of authority affecting a substantial right, such as where a clerk of the court goes beyond his authority and either enters a judgment in contract and tort where the statute permits entry in contract only (Bouker Contracting Co. *v.* Neale, 161 App. Div. 617) or enters judgment where his only function is to hear and report (Cartier *v.* Spooner, 118 App. Div. 342). The judgment entered against the debtor here was entered on a genuine debt in favor of the real party in interest; and it is *res adjudicata* as regards the Brooklyn National Bank and Fox, as well as the debtor and its creditors. Candee *v.* Lord, 2 N. Y. 269. That is all that respondents can rightfully demand."

In *Shorer* v. *T. P. & P. Co.*, 119 N. Y. 483, cited by the Petitioners, the defendant was prejudiced and deprived of a substantial right. Although he had appeared in the action, judgment was entered without notice to him. He was in the same relative position as though he had not received process.

In *Greenfield* v. *Greenfield*, 215 App. Div. 504, cited by the petitioners, no clerical error was claimed. The ruling was that the Court had no jurisdiction to grant a judgment of separation by consent and without proof.

In *Christal* v. *Fifty Five Columbus Corp.*, 168 Misc. 119, cited by the petitioners, an affidavit for summary judgment was not made by the person having knowledge of the facts and a cause of action had not been established.

In *Fidelity & Casualty Co.* v. *Merendino,* 220 App. Div. 24, cited by the petitioners, the record on appeal discloses that the defendant was not indebted to the plaintiff.

Herpe v. *Herpe,* 225 N. Y. 323, cited by the petitioners, was an equity action between rival claimants to a bank account. The bank was a defendant. The Trial Court, exercising its discretion in equity, denied costs to plaintiff; on motion, Special Term amended and granted costs. The Court of Appeals held that Special Term did not possess such power, meaning that it had no jurisdiction to review a Trial Term order.

In brief, the petitioners' attack upon respondent's judgment is technical and without substance. If the respondent had applied for a substitution, it would have been granted *pro forma.* The petitioners on their own showing could not thwart it. They owed the money and admitted that the assignment was valid.

POINT II.

The New York Supreme Court acquired jurisdiction of the Respondent.

The respondent Fox voluntarily submitted to the jurisdiction of that Court.

It has been held that one may consent to jurisdiction.

De Dood v. *Pullman Co.,* 57 Fed. 2d 171;
Gilbert v. *Burnstine,* 255 N. Y. 348;
Thurber-Whyland Co. v. *Klittner,* 16 N. Y. Supp. 828;
Matter of Heldmann, 153 App. Div. 583;
Matter of Holmes, 291 N. Y. 261, 283.

POINT III.

The judgment is not subject to collateral attack.

The court below correctly stated the rule, viz.:

> "Since this is a collateral attack on the New York judgment, we cannot hold the lien invalid unless the defect is one which, under the New York law, went to the jurisdiction of the Court. *White* v. *Crow*, 110 U. S. 183; *McGoon* v. *Scales*, 76 U. S. 23," and other cases.

Conclusion.

The petition for a writ of certiorari should be denied.

Dated, New York, April 1, 1946.

Respectfully submitted,

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